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STEPHEN R. ROSS

August 31, 1993

HAND-DELIVERED

William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 - Rate Regulation
MM Docket No. 92-266

Dear Mr. Caton:

Enclosed on behalf of the Medium-Sized Operators Group, are the original and four copies of the Group's Comments in the above-referenced proceeding. The attached Affidavit contains the facsimile signature of Leo J. Hindery. The original signature will be submitted as soon as possible.

Please address any questions concerning these Comments to the undersigned.

Cordially,

S R Ross

Stephen R. Ross

SRR/sdb
Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of: Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	)	MM Docket No. 92-266

COMMENTS OF THE MEDIUM-SIZED OPERATORS GROUP ON THE FURTHER NOTICE OF PROPOSED RULEMAKING

Adelphia Communications Corporation
Bresnan Communications Company
Cablevision Systems Corp.
Columbia International, Inc.
Falcon Cable TV
Hauser Communications
InterMedia Partners
Jones Spacelink, Ltd.
Lenfest Communications, Inc.
Marcus Cable
Prime Cable
RP Companies, Inc.
Simmons Communications, Inc.
Star Cablevision Group
Sutton Capital Associates
Triax Communications Corp.
United Video Cablevision, Inc.
US Cable Corporation

Stephen R. Ross
Paula E. Brodeur

Ross & Hardies
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(202) 296-8600

Dated: August 31, 1993

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
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In the Matter of: Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	)	MM Docket No. 92-266

COMMENTS OF THE MEDIUM-SIZED OPERATORS GROUP ON THE FURTHER NOTICE OF PROPOSED RULEMAKING

The medium-sized operators group[1] ("Group"), by its attorneys, hereby submits the following comments to the Federal Communication Commission's ("FCC" or "Commission") Memorandum Opinion and Order and Further Notice of Proposed Rulemaking ("Notice"), FCC 93-389, MM Docket No. 92-266 (released August 10, 1993).

The Group's members operate cable television systems which together represent more than 25% of the total cable television subscribers in the United States, and are directly affected by the proposed regulations. Accordingly, the following comments are respectfully submitted in response to the Commission's Notice in the above-referenced proceeding.

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[1] The members of this group include: Adelphia Communications Corporation; Bresnan Communications Company; Cablevision Systems Corp.; Columbia International, Inc.; Falcon Cable TV; Hauser Communications; InterMedia Partners; Jones Spacelink, Ltd.; Lenfest Communications, Inc.; Marcus Cable; Prime Cable; RP Companies, Inc.; Simmons Communications, Inc.; Star Cablevision Group; Sutton Capital Associates; Triax Communications Corp. United Video Cablevision, Inc. and US Cable Corporation.

I. INTRODUCTION

In its Notice, the Commission requested comment as to whether any relief that it ultimately provides to small cable systems should extend to all small systems or only to systems that are not affiliated with or controlled by large multiple system operators ("MSOs"). The Group fully supports a small system exemption, but submits that any relief provided to small systems should be provided to <u>all</u> small systems with fewer than 1,000 subscribers, without regard to whether the system is owned by an independent operator or by an MSO. Moreover, the Group asserts that, for purposes of rate regulation, system size should be determined on a <u>franchise area</u> basis rather than on a principal headend basis

II. DISCUSSION

A. Relief Should Be Provided to All Small Systems, Regardless of Ownership.

In its <u>Report and Order and Further Notice of Proposed Rulemaking</u>, MM Docket No. 92-266, FCC 93-177 (released May 3, 1993), 58 Fed. Reg. 29736 (May 21, 1993) ("<u>Report and Order</u>"), the Commission determined that it would apply its rate regulation rules to small systems with under 1,000 subscribers, regardless of whether the system is an independently-owned system or owned by an MSO. <u>Report and Order</u> at para. 464. The Commission declined to presume that MSO ownership of a small system automatically would make compliance with the Commission's rate regulation rules and procedures less costly, noting that the language of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act") does not distinguish between such systems and that the problems faced by small systems serving smaller communities occur whether or not the system is owned by an MSO. However, in its August 10, 1993 Notice the Commission now seeks comment as to whether any relief that it ultimately may provide to small cable systems should extend to all small systems or only to systems that are not affiliated with or controlled by large MSOs.

The Group submits that any relief afforded to small systems under the Commission's rate regulation rules and procedures should be afforded to all small systems, regardless of ownership. The unique and costly problems associated with serving smaller, usually more rural, communities do not vary with the size of the system's owner or with the number of systems owned by the system's owner. As noted by the Commission, in light of the decentralized nature of the cable industry, it cannot be presumed that large MSO ownership of a small system automatically would make compliance with the rate regulation rules and procedures less costly. Report and Order at para. 464. The Cable Act requires that comprehensive regulation be performed at the local level, and local system personnel must respond to issues relating to the individual system. Although some very limited number of issues may be dealt with at the corporate level, the vast majority of issues and controversies requiring the expenditure of personnel, time and other resources are confronted at the franchise level, and the overall costs of administration are virtually the same regardless of ownership. The attached affidavit of Leo J. Hindery, Jr. illustrates this point. In short, because the costs of administering the regulation of small systems are the same regardless of system ownership, the Commission's treatment of small systems should be the same regardless of the size of the system's owner and should not be based on the myth of cross-system subsidization. In fact, disparate treatment would provide a disincentive for an MSO to continue to own, or to purchase and rebuild, small systems.

Finally, as previously noted by the Commission, the Cable Act itself makes no distinction between independently owned small systems and those owned by MSOs.[2] Indeed, one Congressman unsuccessfully lobbied for an amendment to the Cable Act to add just such a distinction. 138 Cong. Rec. H6526 (July 23, 1992). The absence of any such distinction in the Cable Act reflects Congress' clear intent to relieve the administrative burden and associated costs for all small systems, regardless of ownership. Moreover, the result of any classifications by the Commission on the basis of ownership of a small system is a violation of equal protection. It is well-settled that the equal protection clause is applicable not only to discriminatory legislative action, but also to discriminatory governmental action in the administration and enforcement of the law. See Yick Wo v. Hopkins, 118 U.S.

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[2] Nothing has changed since that initial FCC assessment to warrant a different treatment.

356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); Thurman v. City of Torrington, 595 F.Supp. 1521 (1984). A classification which distinguishes one small system from another solely on the basis of whether it is owned independently or owned by an MSO -- i.e., a "means test" -- is tantamount to an administrative classification used to implement the law in a discriminatory fashion.

Accordingly, the Group submits that no basis exists to justify distinguishing between a small system owned by an independent operator and one owned by an MSO. It is only the size of each individual system, and not the size of its operator, which should dictate whether a given system is entitled to treatment as a "small system" for purposes of rate regulation.

B. Small System Size Should Be Determined On a Franchise Area Basis.

In its Report and Order, the Commission concluded that it will determine system size by a system's principal headend (including any other headends or microwave receive sites that are technically integrated to the system's principal headend) rather than on a franchise area basis. Report and Order at para. 465. The Commission noted that this definition would harmonize its small system rule with most of its existing regulations on cable system size. Id. The Group strongly disagrees and asserts that small system size needs to be determined on a franchise area basis in order to harmonize with the framework of the Cable Act, since the Cable Act requires the primary administration of rate regulation to be at the local franchise area level (and not on an integrated headend basis). To do otherwise could make a single "system", as defined by the Commission, subject to several different franchising agreements, franchise fees and PEG requirements, all because (and only because) the franchise areas are connected by the same headend.

Determining system size on a headend basis would create an unacceptable administrative burden for the cable operator, which would be compelled to prepare separate FCC Forms 393 or submit separate cost-of-service showings for very small franchise areas solely because of their integration into a single headend. At the same time, small communities would be caught up involuntarily in unnecessary rate regulation simply by virtue of an operator's technical configuration. Regardless of the ownership of the cable system, the administrative burden on the franchise authority is the same. Each FCC Form 393 or cost-of-service showing must be reviewed at the franchise level, using the local community's limited resources. For both the cable operator and the franchising authority, there are certain fixed legal, accounting and administrative costs which exist regardless of ownership or system size.

Determining system size on a headend basis would, no doubt, also severely discourage technological advances, such as eliminating outdated headend equipment in favor of fiber optic interconnection of franchise areas. An operator contemplating the consolidation of separate franchises and/or headends, each with fewer than 1,000 subscribers, into one, by means of fiber optic installation, would face a significant disincentive to proceed, as the newly created "system" may then contain more than 1,000 subscribers, thus making the operator ineligible for relief.

Accordingly, for all of the reasons stated, the Group submits that "small system", for purposes of rate regulation, should be defined on the basis of franchise area and not on an integrated headend basis.

III. CONCLUSION

Based on the foregoing, the Group respectfully requests that the Commission adopt the proposals discussed herein.

Respectfully submitted,

THE MEDIUM-SIZED OPERATORS GROUP

By: ______________________________

Stephen R. Ross
Paula E. Brodeur

ROSS & HARDIES
888 16th Street, N.W.
Suite 300
Washington, D.C. 20006
(202) 296-8600

Dated: August 31, 1993

AFFIDAVIT

County of San Francisco }
} SS:
City of San Francisco }

I, Leo J. Hindery, Jr., having been first duly sworn, do state that I am the Managing General Parner for InterMedia Partners and its affiliates ("IP"). In that capacity I am responsible for the overall management of IP.

On or about June 30, 1992, IP acquired a collection of small cable systems owned by Star Midwest, Inc. and affiliated companies headquartered in Fond du Lac, Wisconsin ("Star"). As a group, the Star systems covered four states (Minnesota, Wisconsin, Iowa and Illinois), had 111 headends and 215 franchises. As of July 31, 1993, the Star systems had 114,500 basic subscribers and thus had an average size of 533 subscribers per franchise area.

At the time of acquisition, the Star systems were managed by four area managers with offices in Eveleth, Minnesota; Redwood Falls, Minnesota; Viroqua, Wisconsin; and, Eureka, Illinois. The Fond du Lac office supplied management and engineering oversight and did the accounting and marketing for the systems.

Operating a cable television system, particularly a small, rural system, is an intensely local experience. The need to attend local city or county council meetings exists regardless of the size of the owner. The need to maintain and test each system must be done by technicians located at or near the system. Handling customer visits and telephone calls is also a local function. In many of the Star systems, cash payment of the monthly cable bill is a normal practice. Therefore, maintaining a local office in or near each franchise area is important, especially in view of the FCC's new customer service standards.

When IP took over management and control of the Star systems, it reviewed the existing management structure and determined that it could not consolidate the existing areas further. The four area offices thus remained open and staffing size was not affected. The management and engineering functions of the Fond du Lac office are now performed by IP's new Midwest Regional office located in a suburb of Minneapolis-St. Paul. This office was established and staffed solely to support the four area offices acquired from Star.

Accounting is now done in San Francisco, IP's headquarters location. In order to handle the accounting for the Midwest Region systems, IP hired additional accountants and increased its associated clerical staff. Marketing is handled by IP's Marketing Services Group which is located in Tucson, Arizona. It is likely, however, that a regional marketing manager will be hired for the Midwest Region. Moreover, in light of upcoming franchise renewals and for other reasons, IP is in the process of dividing two of the area regions into three regions thereby creating five regions overall.

In my opinion, based on IP's experience in this matter, the acquisition of the Star systems by a larger MSO has not resulted in a decrease in either the local effort nor the local staff needed to operate the systems. In fact, there has been a deepening of administrative support from both IP's headquarters office and the Twin Cities regional office to the four (soon to be five) Star area offices, compared to the level of support which existed under the prior (smaller) owner. This has resulted in new costs, but overall service to the subscribers has improved in our opinion.

IP prides itself in the efficient and professional way it operates its cable television systems. However, there were no efficiencies to be had in restructuring the basic management organization created by the prior, smaller owner in this case. Administrativo costs generally are higher in the Midwest Region in comparison to IP's larger cable systems. Operating small cable systems must be done locally, regardless of the size of the owner of the system.

Leo J. Hindery, Jr.

Signed and sworn to before me this 31 day of August, 1993.

NOTARY PUBLIC

PWR1
GEORGE GUISTI
Comm. # 854587
NOTARY PUBLIC - CALIFORNIA
City and County of San Francisco
My Comm. Expires Nov. 24, 1993
PWR1

CERTIFICATE OF SERVICE

I, Susan D. Benson, a secretary of the law office of Ross & Hardies do hereby certify that I have this 31st day of August, 1993, served by hand-delivery, a copy of the foregoing "Comments of the Medium-Sized Operators Group on the Further Notice of Proposed Rulemaking" to:

Chairman James H. Quello
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

Commissioner Andrew C. Barrett
Federal Communications Commission
1919 M Street, N.W.
Room 826
Washington, D.C. 20554

Commissioner Ervin S. Duggan
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

Roy J. Stewart
Federal Communications Commission
1919 M Street, N.W.
Room 314
Washington, D.C. 20554

By: ______________________
Susan D. Benson